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Supreme Court of the United States

OCTOBER TERM, 1974

THE STATE OF CONNECTICUT and ROSE SANTINI, as Administratrix of the Estate of Aldo Santini, Deceased,

Petitioners,

—against—

HOWARD KLARMAN, THE TOWN OF WESTPORT and FRED KELLOGG, JR.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE TOWN OF WESTPORT AND FRED KELLOGG, JR., RESPONDENTS IN OPPOSITION

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STATUTES

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Opinions Below

The opinions of the District Court and the Court of Appeals for the Second Circuit are printed in the Appendix of petitioners.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

1. Were the Courts below in error in holding that the deceased, Aldo Santini, was not a seaman entitled to sue his "employer," the Town of Westport, under the Jones Act, 46 USC 688, *et seq.*?

2. Were the Courts below in error in holding that the deceased was not entitled to the warranty of seaworthiness of the Marine I; that he was not doing the traditional work of seamen within the holding of the Supreme Court in *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85 (1946)?

Statement of the Case

Claimant-Appellant, Rose Santini, as Administratrix of the Estate of the late Aldo Santini, appealed from the decree in judgment of the District Court (Honorable Thomas F. Murphy) dated August 23, 1973 granting the petition for exoneration and thus exonerating petitioner, Howard Klarman, from "all liability", dismissing the claims of claimants and petitioner against third-party defendants (Town of Westport and Police Officer Frederick Kellogg, Jr.) and entering judgment in their favor on all claims asserted against them in the proceeding below (Petitioners' brief, Appendix B).

The Court of Appeals for the Second Circuit entered an opinion by Judge Jameson, Senior District Judge of the District of Montana (sitting by designation), with Judge Lumbard concurring, affirming the judgment; Judge Hayes in a separate opinion dissented and voted to reverse the decision of the District Court and remand the case for determination of damages (Petitioners' brief, Appendix A).

The Accident

At about 4:30 P.M. on July 26, 1964, Klarman and several guests boarded his 28-foot sailing yacht "Fling" at Westport Harbor for a sail on Long Island Sound. Under power the Fling headed south along the main channel of the Saugatuck River. Near Buoy No. 13 off Bluff Point, it ran aground on the mud or sand bottom, while being piloted by Klarman's brother-in-law. Klarman attempted unsuccessfully to back off the strand by using the Fling's engine. A private motor cruiser was hailed and tried unsuccessfuly to free the Fling by towing from her bow.

At about 4:45 P.M. the Marine I happened on the scene. The Marine I, a 26-foot launch powered by a 125 horsepower engine, was owned by the Town of Westport

and operated as a patrol boat by its Police Department. It was under the command of Officer Kellogg, a member of the Westport Police Department.

Aldo Santini was aboard the Marine I as a volunteer member of the Westport Civil Defense, receiving on-the-job training instruction as an auxiliary police officer. This was his first and only time aboard the Marine I. Officer Kellogg testified that Santini was not "more or less permanently attached" to the Marine I, that the sole reason for his presence on the launch was to receive on-the-job training and that he was not really "supposed to do anything". Kellogg normally operated the Marine I by himself. Santini was on the Marine I for the purpose of observing what the police were doing and learning the reasons therefore, and he was not required, duty bound or even asked to perform any services in connection with the operation of the launch (Petitioners' brief, Appendix A, pp. 11, 22-23). There was no evidence that the yacht Fling was in any danger either by reason of the grounding or any untoward weather conditions .

POINT I

Santini's Status Was Correctly Determined by the Courts Below; He Was Not a Member of the Crew of the Marine I Entitled te Sue under the Jones Act.

Initially to reach the question of decedent's right to damages in the Jones Act suit this Court must find Jones' Act entitlement and must reverse the finding of fact of the Trial court, affirmed on appeal, that the Town of Westport and Officer Kellogg were not negligent.

The *Law of Seamen,* Norris (3rd Ed. 1970) Volume 2, § 663, at page 294 states the test of status to be applied in determining the Act's availability. Thus:

> To determine whether the injured person is a seaman with Jones Act rights, the following three requirements should be answered in the affirmative:

(a) The vessel be in navigation;

(b) That there be a more or less permanent connection with the vessel; and

(c) That the worker be aboard primarily to aid in navigation.

This is settled law, laid down in numerous decisions of this Court, *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370 (1957); *Butler* v. *Whitman*, 356 U. S. 271 (1958); *South Chicago Co.* v. *Bassett*, 309 U. S. 251 (1940); *Swanson* v. *Marra Bros., Inc.*, 328 U. S. 1 (1946) and is, of course, followed in the second circuit, *Harney* v. *William M. Moore Building Corporation*, 359 F. 2d 649, 654 (2 Cir., 1966).

Claimant failed to show that the deceased was more or less permanently connected with the Marine I. In fact, he had never been aboard the vessel before and there was no evidence that he would have ever been assigned to it again. Claimant failed to produce any evidence that the decedent was aboard naturally and primarily to aid in the navigation. In fact, he had no duties in connection with the navigation and was not asked to perform any duties. His only obligation from the evidence appears to have been to receive on-the-job training in civil defense so that he would be acquainted with State laws and what the police were doing and why they were doing it. He was not supposed to do anything; it was not his job to do anything. He was assigned to the launch by the Chief Auxiliary Officer so that he might be given instruction in the police work done aboard the launch.

The connection with the vessel may be less than permanent, but cannot be temporary or transitory. *Bullis* v. *Twentieth Century-Fox Film Corp.*, 474 F. 2d 392, 394 (9 Cir., 1973); *Rotolo* v. *Halliburton Co.*, 317 F. 2d 9 (5 Cir.), cert. denied, 375 U. S. 852 (1963); *Thibodeaux* v.

J. Ray McDermott & Co., 276 F. 2d 42 (5 Cir., 1960). In the instant case the trial court correctly held, and the second circuit affirmed, that claimant failed to prove any permanent connection, a conclusion which is inescapable from the record.

Moreover, as we previously stated, if the determination of Jones Act entitlement is to be other than an academic enterprise, this Court must first reverse the trial court's finding of fact that there was no negilgence.

POINT II

Santini Was Not Owed a Warranty of Seaworthiness by Marine I.

The question proposed by petitioners which inquires into the priority of the holding that the decedent was not entitled to the warranty of seaworthiness of the Marine I is mislaid, unless this Court wishes to also re-examine the trial court's finding, reaffirmed by the court of appeals, that the Marine I was seaworthy.

In any case, Santini was not entitled to the warranty of seaworthiness by the Marine I. He was not performing any duties in connection with the work of the police launch and thus was not a "Sieracki seaman" and was not entitled to the warranty of the Marine I.

A shipowner's duty to furnish a seaworthy vessel arises out of the relationship between a shipowner and his crew and those who come aboard to perform services traditionally rendered by the crew. *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85 (1946); The *Law of Seaman,* Norris (3rd Ed. 1970), Volume 2, § 613, p. 169.

Subsequent decisions enlarged the class of shipboard workers entitled to the warranty for reasons consistent with this Court's rationalization in the *Sieracki* decision—the warranty was extended to maritime workers; however, a commercial relationship between the worker asserting the

right to the warranty and the vessel owner was invariably present. That is, the warranty was extended only to those performing commercial services for the vessel. Thus, in *Dimas* v. *Lehigh Valley Railroad Company,* 234 F. 2d 151, 153 (2 Cir., 1956) the court stated:

> That case [*Sieracki*] also enlarged the class of persons within the protection of the doctrine of unseaworthiness to include employees of an independent contractor performing what has traditionally been considered 'ship's work.'

See also *McDaniels* v. *Lisholt,* 155 F. Supp. 619 (SDNY 1957), aff'd, 257 F. 2d 538 (1958), cert., granted, revers'd and remanded, 359 U. S., 26 (1959), retried, 180 F. Supp. 24 (SDNY 1959), aff'd, 282 F. 2d 816 (2 Cir., 1960), cert. denied, 365 U. S. 814 (1961).

Petitioners hope to attach liability to respondents for the damages flowing from this unfortunate accident, which can only properly be characterized as one contemplated by the Connecticut State Workmen's Compensation Statute, have provoked the making of certain bold and misleading statements. The characterization of the case of *Nikiforow* v. *Rittenhouse,* 277 F. Supp. 608 (E. D. Pa. 1967), as one where "the facts were on all fours" with the case at bar is an example. The injured person in that case was concededly a member of the crew. In fact, he was an enlisted man in the United States Coast Guard duly assigned to a Coast Guard Patrol vessel.

Simarlarly in the case of *Grigsby* v. *Coastal Marine Services of Texas, Inc.,* 412 F. 2d 1011 (5 Cir. 1969), Petition for cert. denied, 396 U. S. 1033, petitioners in their brief on page 5 unequivically state that "the ultimate facts in *Grigsby* bore a striking resemblance to the facts in this case". Again, this contention is misleading. In the *Grigsby* case, which probably represents the ultimate exten-

sion of the *Sieracki* doctrine, the decedent was himself the rescuer and there was, in fact, a real danger. In the case at bar, the rendering of assistance by Officer Kellogg was nothing more than that. There was no evidence of danger or peril. The yacht Fling was aground on a sand bar in sheltered waters on a peaceful Sunday afternoon. Santini did not participate in the rescue. As the trial court found, he was nothing more than a spectator. This view was also adopted by the court of appeals in affirming.

Clearly, decedent's status as a crew member entitled to the warranty of seaworthiness under the Jones Act was not proven. Claimant's contention that decedent was aboard the launch to perform the traditional work of seamen was not proven. Likewise his status as an alleged amphibious good samaritan or servant of the Fling was not proven.

Beyond the foregoing, however, the Court below found as a matter of fact that Marine I was not unseaworthy and that Officer Kellogg was not negligent, and these findings were based on substantial evidence, accepted by the appellate court.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

Respectfully submitted,

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